


Department of Energy Contractor Attorneys' Association






2013 DOECAA Spring Webcast

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Overview

- Part 719: Final Rule
- Determinations on Cost Allowability
- Tecom/Legal Costs
- Sequestration and Contract Funding
- Contracting/Subcontracting Developments
- False Claims Act Developments




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Part 719 Final Rule

- Common Interest Privilege
- Settlement Agreement Approval
- Determinations of Cost Allowability
 - Advance Approval Requirements




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Part 719 Final Rule

- Common Interest Privilege—General Principles
 - Strongest if exchange is between counsel regarding common interest in legal strategy in litigation
- Requirement to treat information received as subject to underlying privilege or protection
 - Attorney-Client Privilege
 - Attorney Work Product
- Requirement to use information solely for purpose of joint defense or prosecution of case
- Requirement to maintain information received in confidence
 - Standard element of joint defense agreements




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Part 719 Final Rule

- DOE/NNSA requirement for approval of litigation and settlements implicates potential issues
 - Unless DOE/NNSA is agreeing to reimbursement of litigation costs—potentially thorny issue of “common interest”
 - By the time of proposed settlement, the facts relevant to cost allowability determination are generally known
- Similar issues on CO advance approval of allowable costs
 - DOE to have “unlimited access to and dominion over” databases
- Both DOE/NNSA and Contractors need to ensure that communications are tailored to fit common interest privilege
 - Most sensitive communications may benefit from written agreement

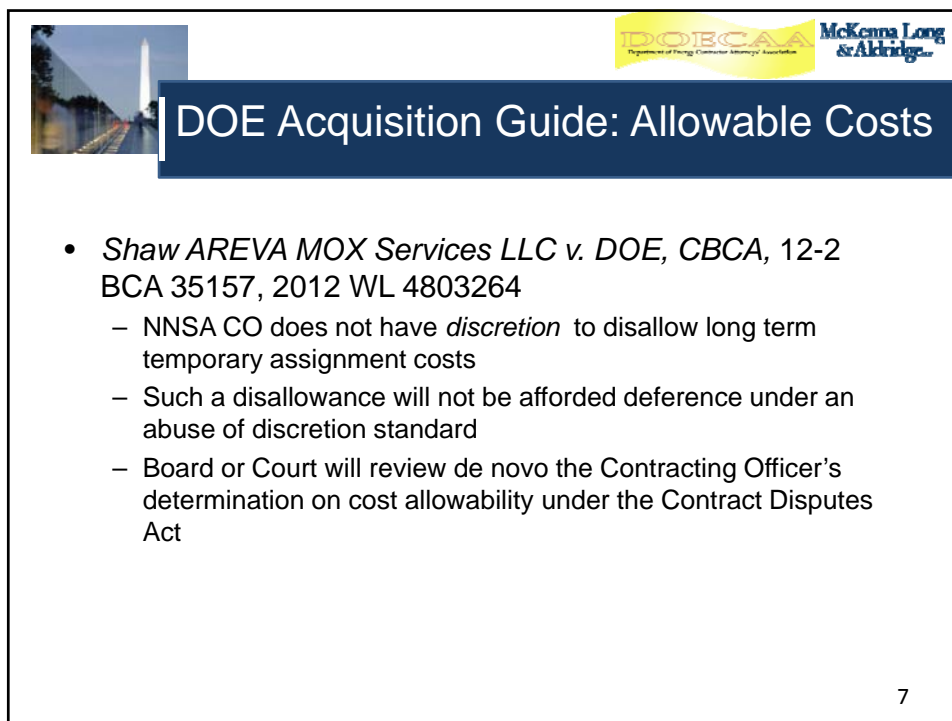
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DOE Acquisition Guide: Allowable Costs

- Revised Acquisition Guide Chapter 31.4 (April 2013)
 - What are the limits on the Contracting Officer's ability to restrict or set costs before costs are incurred?
- Page 6 of the guidance provides--
 - CO should consider whether it is prudent to specify what the Government will consider reasonable regarding a particular cost prior to the contractor incurring the cost. *The CO may proscribe the cost, set a ceiling on the cost, establish criteria for determining the reasonableness of the cost, or take any other steps he or she thinks prudent to avoid dispute on reasonableness of costs.*

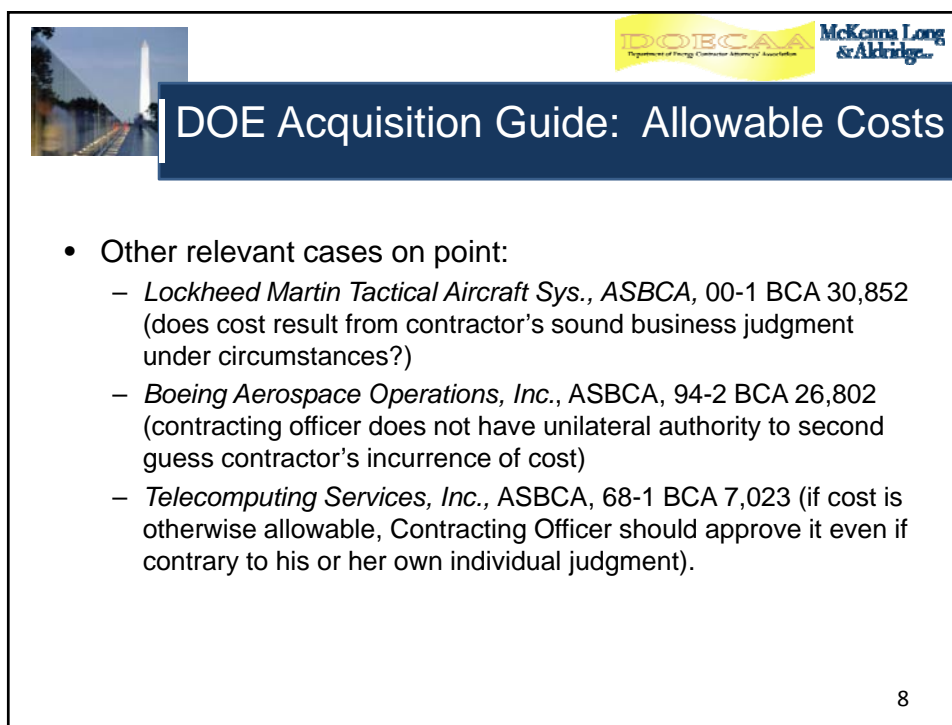
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DOE Acquisition Guide: Allowable Costs

- *Shaw AREVA MOX Services LLC v. DOE, CBCA, 12-2 BCA 35157, 2012 WL 4803264*
 - NNSA CO does not have *discretion* to disallow long term temporary assignment costs
 - Such a disallowance will not be afforded deference under an abuse of discretion standard
 - Board or Court will review de novo the Contracting Officer's determination on cost allowability under the Contract Disputes Act




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DOE Acquisition Guide: Allowable Costs

- Other relevant cases on point:
 - *Lockheed Martin Tactical Aircraft Sys., ASBCA, 00-1 BCA 30,852* (does cost result from contractor's sound business judgment under circumstances?)
 - *Boeing Aerospace Operations, Inc., ASBCA, 94-2 BCA 26,802* (contracting officer does not have unilateral authority to second guess contractor's incurrence of cost)
 - *Telecomputing Services, Inc., ASBCA, 68-1 BCA 7,023* (if cost is otherwise allowable, Contracting Officer should approve it even if contrary to his or her own individual judgment).




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Allowability of Legal Proceeding Costs

- *Chu v. The Boeing Company*, 2012 WL 5861657 (Fed. Cir. Nov. 20, 2012)
 - Finds that “proceeding costs” under unique terms of the Rockwell Rocky Flats contract should be parsed between claims on which Rockwell was found liable or not
 - Leaves some uncertainty on whether Federal Circuit might rethink some limits to prior decisions in *Rumsfeld v. General Dynamics Corp.*, 365 F.3d 1380 (Fed. Cir. 2004) and *Brownlee v. DynCorp.*, 349 F.3d 1343 (Fed. Cir. 2003) which provide a broader definition to the term “proceeding” under Major Fraud Act
 - DOE/NNSA litigation would benefit from contextual definition




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Allowability of Legal Proceeding Costs




- Draft *Tecom* Implementation Guidance
 - Placing aside issues of whether or not *Tecom should apply* . . .
 - Limits application of *Tecom* to legal costs associated with violations of anti-discrimination provisions of the contract *such as* FAR 52.222-26 (Equal Opportunity), FAR 52.222-35 (Equal Opportunity for Veterans), and FAR 52.222-36 (Affirmative Action for Workers with Disabilities).
 - The more tightly construed this coverage remains and is enforced, the greater certainty for contractors and Site counsel in determining allowable costs
 - Focus of “little likelihood of success” analysis in the event of settlement should be on contractor’s objective conduct

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- Carefully consider specific clauses under contract at issue
 - Limitation of Funds (FAR 52.232-22)
 - Limitation of Cost (FAR 52.232-20)
 - Obligation of Funds (DEAR 970.5232-4)
- Notice Provisions
 - *Dynamics Research Corp.*, ASBCA (March 26, 2013)
 - Contractor failed to provide sufficiently specific notice to CO required by DFARS LOGO clause
- Obligation of Funds clause
 - Termination costs excluded from calculation of available funds
 - DOE/NNSA obligation to fund from other legally available sources and, if not available, use best efforts to find funding

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- Y-12/Pantex GAO Protest Decision (April 29, 2013)
 - Protest sustained
 - GAO finds agency deviated from source selection criteria in evaluation of offerors' proposed cost savings initiatives
- Orion Technical Resources LLC v. Los Alamos National Security LLC (N.M. Ct. App. Aug. 6, 2012)
 - Court affirms ability of disappointed bidder to bring action on breach of implied contract to fairly consider proposals
 - RFP did not include dispute resolution process
 - Compare: *Blue Water Environmental Inc. v. U.S.*, 60 Fed. Cl. 48 (2004)(finding no basis for protest of M&O award of subcontract)




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False Claims Act Developments

- *U.S. ex rel. Hooper v. Lockheed Martin Corp.*, 688 F.3d 1037 (9th Cir. 2012)
 - Relator allowed to allege false cost estimates to obtain CPAF contract
- *U.S. ex rel. Rambo v. Fluor Hanford LLC*, (E.D. Wash. April 2013)
 - Settlement of alleged violations of Byrd Amendment restrictions on use of appropriated funds for lobbying

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False Claims Act Developments

- *U.S. ex rel. Wall v. Circle C Constr. LLC*, 697 F.3d 345 (6th Cir. 2012)
 - FCA liability for reckless certification of DBA payroll data based on subcontractor noncompliance
- *U.S. ex rel. Schroeder v. CH2M Hill Hanford Group* (E.D. Wash. May 13, 2013)
 - Order granting United States' motion to dismiss qui tam relator from suit based on his culpability (conviction of criminal conduct in alleged time card fraud)
 - 31 USC 3730(d)(3)

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Conclusion

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